

BALACHANDRAN KANDASAMY

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v.

PERMATA SAUJANA (M) SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI MAKINUDIN J
[ORIGINATING PETITION NO: D3-28-198-2001]
2 FEBRUARY 2005

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CIVIL PROCEDURE: Execution - Stay - Application for - Whether there was competent application for stay before High Court - Whether appeal against winding-up order properly brought before Court of Appeal - Whether notice of appeal must be served on every supporting creditor - Whether supporting creditors were parties to winding-up action - Whether r. 6 Rules of the Court of Appeal 1994 applied

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COMPANY LAW: Winding-up - Stay - Jurisdiction of court to order stay - Whether within inherent jurisdiction of court - Whether winding-up can be stayed notwithstanding making of orders winding up company and appointing provisional liquidator - Relevance of s. 243 Companies Act 1965

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CIVIL PROCEDURE: Execution - Stay - Application to stay orders winding up company and appointing provisional liquidator - Principles and considerations - Whether appeal to Court of Appeal would be rendered nugatory - Provisional liquidator liquidating assets of company and dealing with creditors and bona fide third parties - Whether restitution might become impossible - Whether petitioner would be prejudiced by stay - Preservation of status quo and safeguarding integrity of appeal

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This was the respondents' notice of motion seeking a stay of the orders ('the said orders') made earlier by the instant court winding up the 1st respondent company (upon the petition of the petitioner/contributory) and appointing the petitioner's nominee as the provisional liquidator ('the liquidator'). The stay was applied for pending the respondents' appeal to the Court of Appeal against the said orders.

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Held (allowing the respondents' application):

[1] The petitioner's preliminary objection – that there was no proper appeal before the Court of Appeal and, therefore, no competent application for a stay before the instant court – was unsustainable. Contrary to the petitioner's assertion, there was no need for the respondents to serve the notice of appeal on each and every creditor supporting the winding-

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a up proceedings herein. The supporting creditors were not parties to the proceedings merely because they supported the winding-up action taken by the petitioner against the 1st respondent. Unless and until a supporting creditor has been joined as a party to the winding-up action, the respondents had no obligation to serve any cause papers upon him. Rule *b* 6 of the Rules of the Court of Appeal 1994, therefore, did not support the petitioner's preliminary objection. (p539 e-g)

c [2] The court was empowered to consider the respondent's application under its inherent jurisdiction. Thus, the respondents could still apply for a stay notwithstanding the making of the said orders. When there is a right of appeal, it is implicit that there is also a right to make incidental applications in respect of the pending appeal. The petitioner's opposition to the instant application – on the argument that the power to stay a winding-up petition is governed by s. 243 of the Companies Act 1965, and that the respondents had failed to satisfy the requirements of s. 243 – was misconceived. (p 540 a-d)

e [3] The respondents' appeal to the Court of Appeal against the said orders would, if successful, be rendered nugatory if their application for a stay were refused. This was because the provisional liquidator would have liquidated the assets of the 1st respondent and dealt with creditors and *bona fide* third parties in such a manner as might make restitution unworkable. (pp 540 f-g, 541 c-d & 542 c-d)

f [3a] The petitioner would not be prejudiced by a stay of the said orders. His rights and interests as a shareholder of the 1st respondent would remain intact. The grant of an order of stay here would preserve the *status quo* and safeguard the integrity of the appeal before the court above, and rightly so. (p 542 f)

[Order of stay granted.]

g **Case(s) referred to:**

Chia Yan Tek v. Ng Swee Kiat [1997] 4 CLJ 535 CA (*refd*)

Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 SC (*fol*)

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC (*fol*)

h *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1991] 3 CLJ 2078; [1991] 1 CLJ (*Rep*) 436 SC (*refd*)

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Legislation referred to:

Companies Act 1965, ss. 218(1)(i), 243
Courts of Judicature Act 1964, s. 44(1)
Rules of the Court of Appeal 1994, r. 6

For the applicants/respondents - Harcharan Singh; M/s Harcharan S Sidhu & Assoc
For the petitioner - S Malliga; M/s Malliga & Assoc
For the official receiver - Cik/Puan Veni

Reported by Gan Peng Chiang

JUDGMENT

Zulkefli Ahmad Makinudin J:

This is an application by way of notice of motion (encl. 129) filed by the respondents for a stay of the order of this court made on 20 October 2004 (“the Order”) pending the hearing and determination of the appeal made by the respondents to the Court of Appeal against the said Order. Under the said Order, the petition presented for the winding up of the first respondent company (“the company”) by the petitioner who is a contributory of the company was allowed by this court and Jeyaraj a/l V. Ratnaswamy as nominated by the petitioner was appointed as the provisional liquidator of the company.

At the outset it is my view that this court is empowered to consider an application for the stay of the order under its inherent jurisdiction. The respondents have the right to make this application as this right is still retained despite a winding order has been made and a provisional liquidator has been appointed. In the case of *Sri Hartamas Development Sdn. Bhd. v. MBF Finance Berhad* [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 the Supreme Court *inter alia* stated that where there is a right of appeal it is implicit that there is also a right to make any incidental application in respect of a pending appeal to the court as provided in s. 44(1) of the Courts of Judicature Act 1964. As the Rules of the High Court 1980 not have a corresponding provision to s. 44(1) of the Courts of Judicature Act 1964, I am of the view that this court is then seized with its inherent powers to grant such a stay of a winding up order for the purpose of a pending appeal. The submission of the learned counsel for the petitioner that the power to stay a winding up order for the purpose of a pending appeal is governed by the provision of s. 243 of the Companies Act 1965 and that the respondent has failed to satisfy its requirement is totally misconceived.

- a* Before dealing with the merits of the respondents' application I shall first address the preliminary objection raised by the petitioner in respect of the application. The petitioner has contended that the respondents' Notice of Appeal has not been properly brought before the Court of Appeal as the Notice of Appeal has not been served on all parties directly affected by the appeal,
- b* that is all the creditors as stated in the List of Parties attending at the hearing of the petition who were supporting the petition. The petitioner further contended that since the respondents' application has not been served on all the parties directly affected by the application the respondents' application has also not been properly brought before this court. I find the petitioner's
- c* contention on these two issues untenable in the circumstances of this case. It is my view that the provision of r. 6 of the Rules of the Court of Appeal 1994 only applies when a person has been made a party to the proceedings and has applied and was allowed to be joined as a party. In the present application the supporting creditors are not party to the proceedings by merely
- d* supporting the winding up proceedings filed by the petitioner against the first respondent. Until and unless one is joined as a party to the action there is no obligation for the applicant party to serve unto him any cause papers that has been filed into court. A supporting creditor has to apply to substitute the petitioner even in the case when the petitioner wishes to withdraw itself as a petitioner before the supporting creditor can be a party to the action.
- e* I shall now deal with the merits of the respondents' application. The principles of law applicable for an order to stay execution or proceedings can be found in a number of decided cases. In the case of *Kosma Palm Oil Mill Sdn. Bhd. & Ors. v. Koperasi Serbausaha Makmur Bhd.* [2003] 4 CLJ 1 his lordship
- f* Augustine Paul JCA in delivering the judgment of the Federal Court at p. 11 had this to say:
- g* In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceeding or, in the case of an application for some other form of interim preservation of the subject matter of an appeal, such as the grant of an injunction or other appropriate relief under s. 44(1) of the Courts of Judicature Act 1964, is that the appeal to this court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then it should normally direct a stay or grant other appropriate interim relief that has the effect
- h* of maintaining the *status quo*.
- In the case of *Kerajaan Malaysia v. Jasanusa Sdn. Bhd.* [1995] 2 CLJ 701 his lordship Edgar Joseph Jr. FCJ in delivering the judgment of the Federal Court *inter alia* stated as follows:
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Though the court has an unfettered discretion whether to grant or refuse a stay of execution, the discretion must, nevertheless, be exercised on established judicial principles (see the Federal Court case of *Mohamad Mustafa v. Kandasami (No. 2)* [1979] 2 MLJ 126, *Serangon Garden Estate Ltd. v. Ang Keng* [1953] MLJ 116). It will, as rule only, grant a stay if there are special circumstances (see *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406). A stay will be granted if there are special circumstances, notwithstanding that the tax is due and payable under s. 103(1) of the Income Tax Act 1967 (“the Act”). What, then, constitutes special circumstances? It was said in *Mohamed Mustafa v. Kandasami (No. 2)* at page 127, that:

One of the determining factors that calls for consideration is whether by not making an order of stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.

If, for example, another ground had been that there were merits in the appeal, that fact coupled with the fact that the defendant, if successful, could not be restored to his original position might well have afforded special circumstances to justify the learned district judge in exercising his discretion to grant a stay ...

The learned counsel for the respondents submitted that the winding up order made on 20 October 2004 against the first respondent company has a far reaching implication in that the whole administration of the company would be placed under the provisional liquidator who may not have the requisite knowledge of the administration of the company. There has been no information provided as to the ability and capability of the provisional liquidator in managing the company. Furthermore the respondents alleged that the provisional liquidator is not known to the respondents. It was contended that in the event the appeal to the Court of Appeal is allowed against the decision of this court made on 20 October 2004, there would be a need to make restitution as to the acts of the provisional liquidator which would be difficult to deal with by then as it would involve third party interest. On this point in the case of *Chia Yan Tek v. Ng Swee Kiat* [1997] 4 CLJ 535 his lordship Gopal Sri Ram JCA had this to say:

The jurisdiction to make restitution is inherent in every court and is exercised whenever the justice of the case demands it (see *Jai Berhm v. Kedar Nath Marwari* AIR [1922] PC 269, *Prayag Narain v. Kamekhea* LR 36 IA 97). In *Lala Bhagwan Das v. Lala Kishen Das* (1953) SCR, the Supreme Court of India put the matter thus:

- a** On the reversal of a judgment, the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that is the duty of the court to enforce that obligation unless it is shown that restitution would be purely contrary to the real justice of the case.
- b** The underlying principle is that when the main judgment or order is varied or reversed, all orders consequential or depending upon it are affected and wrongs done under them have to be righted by granting restitution. In order to do this, the court may make any order including an order for the refund of costs or the payment of interests, damages, compensation or mesne profits as may properly be consequential on such variation or reversal of order.
- c** It is to be noted that the primary objective of the provisional liquidator appointed in this case would be to liquidate all the assets of the first respondent company for the sole purpose of paying the provisional liquidator's fees and expenses first and then the other creditors of the company. The
- d** respondents would not be able to estop the provisional liquidator from doing so as he will be well within his statutory powers to act. In this respect I am in agreement with the contention of the respondents that in the event the Court of Appeal allows the respondents' appeal, restitution has to be done and this would create complications as the issue of *bona fide* purchasers for value would arise and the unnecessary expenses that had been incurred would be
- e** irrecoverable. The appeal would then be rendered nugatory.
- It is my view that the petitioner would not be prejudiced in the event this court grants a stay on the order dated 20 October 2004 as the petitioner's rights and interests in the company would be intact as a shareholder. In a winding
- f** up proceeding once a winding up order is made it cannot be set aside even though the said company had settled its debts. The company can only apply to stay the winding up order which in effect stops the further operation of the winding up order. The respondents' application as I see it is aimed at merely preserving the *status quo* and the integrity of the appeal before the
- g** Court of Appeal.
- Notwithstanding that I have allowed the petitioner's application for the winding up of the first respondent company, I still hold the view that the respondent's appeal is not frivolous and it merits consideration as there are various issues raised by the respondents which could be ventilated before the Court of Appeal
- h** as follows:
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- (a) Whether it is just and equitable that the first respondent company be wound up pursuant to s. 218(1)(i) Companies Act 1965. ***a***
- (b) Whether the first respondent company was initially a partnership before its incorporation.
- (c) Has there been a delay in the petitioner filling his petition pursuant to s. 218(1)(i) Companies Act 1965. ***b***
- (d) Is the second respondent who is a shareholder of the first respondent company a nominee to her husband named Fang Leng Kieng.
- (e) Does the second respondent has any responsibility to elect the petitioner as a director in the first respondent company. ***c***

For the reasons above stated I hereby allow the respondents' application and made no order as to costs in respect of the hearing of this application.

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